

STATE OF MICHIGAN
COURT OF APPEALS

JAMES M. HAWLEY and NANCY HAWLEY,

Plaintiff-Appellant,

v

JAMES E. SMITH, JR. And SUSAN P. SMITH,

Defendant-Appellees.

UNPUBLISHED

August 3, 1999

No. 211220

Jackson Circuit Court

LC No. 97-079536 CH

Before: Cavanagh, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Plaintiff sued defendant¹ for the partition of property that the parties held as tenants-in-common and for an accounting of the rents and profits from the property. The trial court confirmed, with minor modifications, a commissioner's report completed in accordance with MCR 3.401, *et seq.*, and entered a judgment dividing the property between the parties. Plaintiff appeals as of right. We affirm.

Actions regarding partition of land are equitable in nature. MCL 600.3301; MSA 27A.3301. Although equity cases are reviewed de novo, the trial court's findings of fact will not be modified or overturned unless clearly erroneous. *Caywood v Dep't of Natural Resources*, 71 Mich App 322, 332; 248 NW2d 253 (1976). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Markillie v Bd of Livingston Co Rd Comm'rs*, 210 Mich App 16, 22; 532 NW2d 878 (1995).

Defendant and his mother each owned a one-half undivided interest in the land that is the subject of this suit. When his mother died, she bequeathed one-half of her interest to defendant and one-half to plaintiff, defendant's half-brother. In his complaint, plaintiff alleged that defendant has retained the property and has collected rents and profits, but that he refuses to account for plaintiff's share. Because the parties could not agree on a division of the property, plaintiff sought a judicial partition. With the agreement of both parties, the trial court appointed a licensed broker as a commissioner and charged him with partitioning the property. The commissioner produced a report that the trial court adopted. The trial court used the report as the basis for partitioning the property. Plaintiff

argues that the commissioner erred, both procedurally and substantively, when he prepared the report, and, consequently, the trial court erred when it relied on the report.

I

Plaintiff first argues that the trial court failed to partition the property in accordance with MCR 3.401(A)(1), which states in pertinent part:

(A) Matters to Be Determined by Court. On the hearing of an action or proceeding for partition, the court shall determine

- (1) whether the premises can be partitioned without great prejudice to the parties;
- (2) the value of the use of the premises and of improvements made to the premises; and
- (3) other matters the court considers pertinent.

Plaintiff asserts that the commissioner committed many errors, including failing to consider the value of the premises, providing a mere mathematical division of the property, and failing to understand his obligations to the court and to the parties. Plaintiff also notes that the commissioner considered the house a liability, that he did not consider the value of the garage, the concrete block building, or the timber, and that he did not list the pole barn in his report. Plaintiff had testified that the garage and pole barn were almost new, and that the cement block building had extra heavy duty floors for use in the welding business. Plaintiff argues that it is absurd to think these improvements have no value, and that MCR 3.401(A)(2) expressly requires the commissioner to consider the property's improvements when partitioning it.

However, our review of the court's opinion and judgment reveals that the trial court assigned some value to the pole barn, garage and cement block building, but it noted that the house might serve as either an asset or a liability, depending on whether defendants decided to invest the money required to renovate it. Based on these considerations, the trial court accepted the partition commissioner's report with one modification, that plaintiff's land be increased by 250 feet to offset the buildings' potential value. Although plaintiff argues that, under MCR 3.401(A)(2), the commissioner must consider the value of improvements and use of the premises, that rule actually requires the trial court to consider these factors, not the commissioner. MCR 3.401(A)(2). We find that the trial court's partition of the property, based in part on the commissioner's report, did not stray from the requirements or purpose of the relevant court rules.

Plaintiff also argues that the commissioner violated MCR 3.402(C)(1), which states in pertinent part:

- (1) The partition commissioner
 - (a) may apply to the court for instructions;

(b) must give notice of the meeting to consider the problems of the partition to the parties so that they may be heard if they wish to be; and

(c) may take evidence at the meeting concerning the problems of partition.

Plaintiff argues that the commissioner sought instruction from the judge, as allowed by subsection (a), but failed to give notice of that meeting, as required by subsection (b). Plaintiff has misinterpreted the rules. Specifically, the cited provision does not require that the commissioner notify the parties when applying for instructions. In subsection (b), “meeting” is preceded by “the,” a definite article. The specific meeting referred to is “*the* meeting to consider the problems of the partition.” That meeting is described in the second half of MRE 3.402(B)(1):

. . . If the parties agree, three commissioners may be appointed who shall meet together to perform their duties and act by majority vote.

Nothing in the rules requires the commissioner to give notice that he has merely applied to the court for instructions. The rule pertains to those situations where multiple commissioners have been appointed, and the commissioners are meeting together to perform their legal duties. Therefore, we find plaintiff’s argument that the commissioner should have notified them that he had requested basic instructions from the trial court to be without merit.

II

Plaintiff also argues that the partition is inequitable because the trial court had no basis on which to properly value the improvements. According to plaintiff, a partition without a proper basis for determining value is arbitrary. Plaintiff maintains that an arbitrary division of the property is inequitable. We disagree with plaintiff’s contention that the trial court acted arbitrarily.

When ruling on an equity issue, the court should reach a fair and equitable outcome. “In equity cases it is not enough for the trial court to have acted in a nonarbitrary manner; it must also reach a disposition that is fair and just.” *Sparks v Sparks*, 440 Mich 141, 150; 485 NW2d 893 (1992). Courts of equity look to the particular circumstances of the case and seek to provide an equitable result. *Oosterhouse v Brummel*, 343 Mich 283, 290; 72 NW2d 6 (1955); *McLean v Diack*, 276 Mich 142, 144-145; 267 NW 808 (1936). “Equity molds its relief according to the character of the case.” *Farrell v Nutter*, 362 Mich 639, 648; 107 NW2d 770 (1961).

At the partition hearing, evidence was presented regarding the property and its improvements. Based on this evidence, the trial court partitioned the property. As noted above, the commissioner testified that the house was of questionable value and condition, that both parties advised him that it might be demolished, and that it was a liability. He also testified that that his proposal was an equitable division of the property. Further, he testified that property with frontage on a road is usually more expensive than back areas, and each party had received frontage. Photographs of the garage, pole barn, and cement block building were admitted. Plaintiff also testified about the condition of the

property. All of this helped provide the trial court with a basis for his decision to compensate plaintiff for the improvements on defendant's portion of the property.

The record suggests that plaintiff desired property with buildings on it. However, the court rules do not require the trial court or the commissioner to attempt to meet any party's wishes; rather, they simply require the trial court to partition the property according to each party's relative share. This Court has stated that "[i]t is well known that factfinders may and should use their own common sense and everyday experience in evaluating evidence." *People v Simon*, 189 Mich App 565, 567; 473 NW2d 785 (1991). Here, the trial court modified the partition commissioner's report by adding 250 feet to plaintiff's partitioned property. We find that the trial court's remedy was within its discretion under MCR 3.401(A), because the testimony and evidence offered at the hearing provided a sufficient basis for the trial court's decision to modify and adopt the commissioner's report.

III

Plaintiff next argues that the trial court erred when it failed to appoint a new partition commissioner. The Michigan Court Rules set out a court's options regarding partition commissioners and their reports. MCR 3.402(B)(3) provides in part that if a partition commissioner neglects to serve, the court may appoint a replacement. MCR 3.402(D)(1) provides:

(D) Setting Aside, Modification, or Confirmation of Partition Commissioner's Report.

(1) The court may modify or set aside the report and may refer the action to either the same or a newly appointed partition commissioner as often as necessary.

It is within the trial court's discretion to appoint a replacement commissioner, modify the report, set the report aside, or refer the matter to the same or a new partition commissioner. Nothing in the court rules requires the trial court to appoint a new commissioner where the first commissioner's report is deficient. Instead, the rules expressly allow the court to make modifications. MCR 3.402(D).

As discussed above, plaintiff argues that the trial court abused its discretion when it accepted the commissioner's allegedly mistaken calculations of the property's value. In civil cases, an abuse of discretion is found only where a result so palpably and grossly violates fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992); *Hottmann v Hottmann*, 226 Mich App 171, 177; 572 NW2d 259 (1997). In equity cases, the trial court's determinations are presumed to be correct, and this Court will not find an abuse of discretion unless it is convinced that it would have reached a different result. *Wilkins v Wilkins*, 149 Mich App 779, 792; 386 NW2d 677 (1986). In the instant case, the trial court had before it evidence regarding the value of the property. It modified the commissioner's report to allow plaintiff an extra 250 feet of property as compensation for the structures on defendants' portion of the property. We see no evidence that the trial court abused its discretion.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Joel P. Hoekstra

/s/ Hilda R. Gage

¹ Plaintiff Nancy Hawley and defendant Susan Smith both assert derivative claims.